IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 660

BURLEY IRRIGATION DISTRICT, a corporation, *Petitioner.*

v.

HAROLD L. ICKES, Secretary of the Interior.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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PETITION.

MAY IT PLEASE THE COURT: The petition of the Burley Irrigation District respectfully shows to this Honorable Court:

STATEMENT OF THE MATTER INVOLVED.

This litigation is the culmination of a long train of events, extending over twenty years. In 1904 the Minidoka Reclamation Project on the Snake River, Idaho, was approved by the Secretary of the Interior (R. p. 336). It was thereafter divided into two divisions: Gravity Division (now Minidoka Irrigation District) and Pumping Division (now Burley Irrigation District). Because the lands now constituting the Burley Irrigation District (petitioner) were topographically higher than the level of the river, a power

plant was necessary to pump the water to the level of the land (Pl. Ex. 1, pp. 151, 156). Ninety-five and six-tenths per cent of the cost of the power plant was charged to the water users in what is now the Burley Irrigation District (Pl. Ex. 1, pp. 152, 157, 158). Subsequently the plant yielded profits from the sale of power for commercial purposes (R. pp. 16, 99 par. 20; R. p. 336). In the year 1927, the then Secretary of the Interior, being authorized by statute to determine the person to whom such profits should be credited, determined that since the water users in the Burley Irrigation District were charged with ninety-five and six-tenths per cent of the cost of the power plant, they became, equitably speaking, the owners of ninety-five and six-tenths per cent of the power plant, and were entitled to have ninety-five and six-tenths per cent of the profits from the sale of power credited to the Burley Irrigation District. A later Secretary reaffirmed this ruling (Pl. Ex. 1, pp. 166-169). Thereafter, in the year 1929, the Minidoka Irrigation District attempted to procure a redistribution of the construction costs and thus to achieve a greater participation in the profits from the power plant (Pl. Ex. 1, pp. 44, 170, 171). Litigation ensued, as a result of which the Court of Appeals for the District of Columbia held that the rights of the Burley Irrigation District were vested property rights, not to be destroyed by executive action (*Wilbur* v. *Burley Irrigation District,* 58 Fed. 2nd 871, 61 App. D. C. 145).

Meantime, in proceedings brought for the purpose, once in the state courts and twice in the federal courts, with all parties in interest before the courts, including the United States and the Secretary of the Interior, the courts of Idaho and of the United States entered identical decrees allocating all of the waters of Snake River. Those decrees allocated 2,700 second-feet of water to the power plant for power purposes (R. p. 196 par. 56; Pl. Ex. 2, pp. 27, 28, 32, 33; Pl. Ex. 3, pp. 10, 11). This amount of water is sufficient to generate enough electric power and enough

electric energy to supply all demands for electric power on the Project, during the non-irrigation season (R. pp. 23, 101, par. 30).

Thereafter, in 1934, the present Secretary of the Interior shut off the 2,700 second-feet of water from the power plant during the non-irrigation (winter) season, stored the water in American Falls Reservoir (a reservoir in which the Burley Irrigation District has no right either to store, or use, water stored therein) and brought in power from a private utility company to supply the power demands on the Project (R. pp. 25-29, 102 pars. 34, 35; R. p. 341). As a result of the sale of this power, the Secretary deducted from the proceeds of the sale of power on the Project, the sum of $50,000, and thereby came into possession of the sum of $50,000. Through a complicated series of contracts, and computations, the Secretary proposed to credit this $50,000 to another power plant (Black Canyon) some 250 miles distant (R. pp. 32, 102 par. 36; R. pp. 86-93; R. pp. 23, 101 par. 31; R. pp. 71-79). Petitioner was not a party to these contracts.

Thereupon the Burley Irrigation District brought suit, alleging that it was the equitable owner of the power plant; that by reason of the decrees of the state and federal courts, 2,700 second-feet of water had become appurtenant to the plant; that the action of the Secretary in shutting off the water without compensation or recourse to judicial process, was an illegal deprivation of a vested property interest; that the $50,000 were the proceeds of this illegal deprivation; that the proposed crediting of the $50,000 to the Black Canyon power plant was a sham; and praying that equity cause the Secretary to credit to the Burley Irrigation District these proceeds from the illegal conversion of its vested property interests (R. pp. 1-37). The District Court of the United States for the District of Columbia dismissed the bill, (R. p. 208) and the United States Court of Appeals for the District of Columbia affirmed the judgment of the lower court (R. pp. 333-350).

QUESTIONS PRESENTED.

The questions in this case are:

1. If a person agrees to pay and does pay, in accordance with the agreement, the cost of a power plant, does he acquire any property right in the plant?

2. If a person agrees to pay and does pay, in accordance with the agreement, the cost of constructing a power plant and by reason of such payment it is determined that he is entitled to a percentage of the profits from the sale of electrical energy generated by the power plant, can it be said judicially that he has a property right in the profits, but has no property right in the power plant?

3. If a person has a vested property interest in a power plant and in water which has been judicially decreed to be appurtenant to the plant and necessary for its operation, can the Secretary of the Interior of the United States deprive such person of the water, prevent the operation of the plant, and the production of profits therefrom, without recourse to judicial process and compensation for such deprivation?

4. If a person be illegally deprived of the use of property in which he has a vested right, and is thereby prevented from making a profit, is he entitled to the proceeds of the illegal conversion?

5. If both Federal and State courts of competent jurisdiction decree a fixed amount of water for use for power purposes at a power plant constructed as a part of a reclamation project, can the Secretary of the Interior shut off and store the water, without the consent of the person who paid for, or agreed to pay for, the power plant, use the water for irrigation of lands to which the cost of the power plant was not charged, without recourse to judicial process and without compensation?

6. Can the Secretary of the Interior legally deprive a person of the use of a power plant for which he has paid, or agreed to pay, and continue to demand and receive payment of the installments of the construction costs as the same become due under the contract?

STATEMENT OF JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on September 30, 1940 (R. p. 333). The decision of the United States Court of Appeals for the District of Columbia will result in depriving petitioner of its property without due process of law, in violation of the Fifth Amendment. This Court has jurisdiction to review the judgment in question under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The United States Court of Appeals for the District of Columbia, in this case, has decided questions of substance relating to the construction and application of the due process clause of the Fifth Amendment of the Constitution of the United States and statutes enacted by Congress, which have not been, but should be, settled by this Court.

2. The United States Court of Appeals, in this case, has decided that landowners and entrymen who have over a long period of years paid the costs of construction of a power plant on a reclamation project, have no property rights in the power plant.

3. The United States Court of Appeals, in this case, has decided that persons may be deprived of vested property rights by the Secretary of the Interior, without resort to judicial process and the payment of just compensation.

4. The decision of the United States Court of Appeals holds, in effect, that water rights judicially decreed for a particular beneficial use on a reclamation project may be taken by the Secretary of the Interior, without resort to judicial process and the payment of just compensation. This decision is in conflict with the decision of this Court in *Ickes* v. *Fox,* 300 U. S. 82, which holds that, although the United States is the diverter, storer and distributor of the water, the water decreed and used for irrigation purposes is an appurtenance to the land to which it is beneficially applied and that, therefore, the water rights are the property of the landowners. The decision is also in conflict with the Idaho Code Annotated, Section 41-101, which provides that water beneficially applied shall become an appurtenance of the "land or other thing to which, through necessity, said water is being applied." The decision is in conflict with the decisions of the Supreme Court of Idaho in *Montpelier Milling Co.* v. *City of Montpelier,* 19 Idaho 212, 113 Pac. 741, and *Basinger* v. *Taylor,* 30 Idaho 289, 164 Pac. 522, which hold that the use of water for power purposes is a beneficial use and the right to such water is a property right which cannot be taken without just compensation under the Constitution of Idaho. The decision is in conflict with the Act of Congress, approved July 26, 1866, 14 Stat. 253, Title 43 U. S. C. A. 661, which provides that when rights to the use of water have vested and are recognized and acknowledged by local customs and laws and the decisions of courts, the possessors and owners of such rights shall be maintained and protected in the same.

5. The decision of the United States Court of Appeals is of public interest and importance, in that it involves the question whether landowners and entrymen who, under the Federal Reclamation Laws, have been charged with and are paying the cost of construction of a power plant on a reclamation project, have acquired an equitable property interest which is protected by the due process clause of the Fifth Amendment against confiscation by the Secretary of

the Interior. The Reclamation Laws contemplate the use of a revolving fund for the construction of projects and that after landowners and entrymen have paid, in periodic installments, the costs of construction, the projects and facilities are to be turned over to them. This Court should determine whether the Secretary of the Interior while these payments are being made and after substantial sums have been paid, may destroy the value of the interests thus acquired by the landowners and entrymen, without compensation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 7522, *Burley Irrigation District, a corporation, Appellant,* v. *Harold L. Ickes, Secretary of the Interior, Appellee,* and that the said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

BURLEY IRRIGATION DISTRICT.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion Below.

The opinion of the District Court of the United States for the District of Columbia (R. p. 326) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. p. 333) has not been reported.

II.

Jurisdiction.

The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

III.

Statement of the Case.

A statement of the facts is set forth in the Petition.

IV.

Specification of Errors.

The United States Court of Appeals erred:

1. In holding that the Burley Irrigation District by paying and agreeing to pay 95.6 per cent of the cost of constructing the Minidoka Power Plant, acquired no property right in the plant.

2. In holding that by paying and agreeing to pay 95.6 per cent of the cost of the power plant, the Burley Irrigation District acquired a property right in the profits from the sale of power generated at the power plant, but did not acquire a vested property right in the plant.

3. In holding that the water which had been judicially decreed to be used for power purposes at the Minidoka Power Plant is not appurtenant to the plant and can be stored and used for irrigation.

4. In holding that the Secretary of the Interior has the right to store water judicially decreed for power purposes and refuse to operate the power plant, and, in order to replace the power that could have been generated at the power plant, bring in power and appropriate $50,000 of the proceeds from the sale of power on the Minidoka Project without any regard for the rights of the petitioner in the water, the power plant or the amount of power brought on to the project.

5. In holding that the judgment entered in the case of *Burley Irrigation District* v. *Wilbur* (Supreme Court of the District of Columbia, Equity No. 50636), affirmed by the United States Court of Appeals for the District of Columbia in *Wilbur* v. *Burley Irrigation District,* 58 Fed. (2d) 871, 61 App. D. C. 145, did not adjudicate and determine

that the Burley Irrigation District has a vested property right in the Minidoka Power Plant, but only adjudicated that the Burley Irrigation District has a vested property right in the profits derived from the sale of power generated at the Minidoka Power Plant.

6. In holding that the use of water for the generation of electricity is a waste of water; that the Secretary of the Interior can refuse to use the water for power purposes, store it for the use of subsequent appropriators for irrigation, without notice or compensation to the owners of the right to use it for power purposes.

7. In holding that the right of the Burley Irrigation District to receive 95.6 per cent of the profits from the sale of power generated at the Minidoka Power Plant was based upon the contract of March 15, 1926, and not upon the fact that the District, and the water-users whom it represents, have paid or agreed to pay 95.6 per cent of the cost of constructing the power plant.

8. In holding that the acts of the respondent do not and will not deprive the petitioner of its property without due process of law.

9. In holding that the acts and proposed acts of respondent are not arbitrary, capricious and unconstitutional.

10. In holding that the judgment and facts found by the Court in *Burley Irrigation District* v. *Wilbur*, (Supreme Court of the District of Columbia, equity No. 50636), affirmed by the United States Court of Appeals for the District of Columbia, in *Wilbur* v. *Burley Irrigation District*, 58 Fed. (2d) 871, 61 App. D. C. 145, and all facts necessarily involved therein, are not res judicata and binding in this action.

11. In holding that recitals in contracts to which the Burley Irrigation District is not a party, are binding upon and evidence against it.

12. In affirming the judgment of the District Court of the United States for the District of Columbia dismissing the bill of complaint.

V.

Provisions of Constitution and Statutes Involved.

Act of July 26, 1866, c. 262, Sec. 9, 14 Stat. 253, Title 43 U. S. C.:

> "Section 661. Appropriation of waters on public lands; right of way for canals and ditches. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *."

Act of June 17, 1902, c. 1093, Sec. 8, 32 Stat. 387, Title 43 U. S. C.:

> "§ 383. Vested rights and State laws unaffected by chapter. Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any States or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, c. 1093, § 8, 32 Stat. 390.)"

* * * * * * * * *

> "§ 419. Contract for irrigation project; notice as to lands irrigable, unit of entry, and construction charges. Upon the determination that any irrigation project is practicable, the Secretary of the Interior may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available, and thereupon he shall give public notice of the lands irrigable under such project, and

limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments in which such charges shall be paid and the time when such payments shall commence: * * *."

* * * * * * * * *

"§ 461. Determination of construction charges generally. The construction charges which shall be made per acre upon the entries and upon lands in private ownership which may be irrigated by the waters of any irrigation project shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably."

* * * * * * * * *

"§ 498. Transfer of management and operation of works to water users generally. When the payments required by this chapter are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress. (June 17, 1902, c. 1093, § 6, 32 Stat. 389)."

Act of August 13, 1914, c. 247, Sec. 5, 38 Stat. 686, Title 43 U. S. C.:

"§ 373. General authority of Secretary of Interior. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the

purpose of carrying the provisions of this chapter into full force and effect."

* * * * * * * * *

"§ 492. Operation and maintenance charges generally. In addition to the construction charge, every water-right applicant, entryman, or landowner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the project, or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered; but each acre of irrigable land, whether irrigated or not, shall be charged with a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water. If the total amount of operation and maintenance charges and penalties collected for any one irrigation season on any project shall exceed the cost of operation and maintenance of the project during that irrigation season, the balance shall be applied to a reduction of the charge on the project for the next irrigation season, and any deficit incurred may likewise be added to the charge for the next irrigation season. (Aug. 13, 1914, c. 247, § 5, 38 Stat. 687.)"

* * * * * * * * *

"§ 499. Discretionary power to transfer management. Whenever any legally organized water-users' association or irrigation district shall so request, the Secretary of the Interior is authorized, in his discretion, to transfer to such water-users' association or irrigation district the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe."

Act of December 5, 1924, c. 4, Sec. 4, subsection I, 43 Stat. 701, Title 43 U. S. C.:

"§ 501. Disposition of profits of project taken over by water users. Whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites

shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid."

* * * * * * * * *

"§ 371. * * *

(e) The words 'division of project' mean a substantial irrigable area of a project designated as a division by order of the Secretary."

Appropriation Act of May 10, 1926, 44 Stats. 480:

"Minidoka project, Idaho: For operation and maintenance, continuation of construction, and incidental operations, $2,005,000: Provided, That the accumulated net profits as determined by the Secretary of the Interior, arising under the project, derived from the operation of the project power plants, leasing of Government grazing and farm lands, the sale and use of town sites, and from all other sources, shall be applied by the Secretary of the Interior, so far as may be necessary, in payment of any water-right charges due the United States by any individual water user or irrigation district to whose benefit personally or in the aggregate such accumulated profits should equitably accrue in the judgment of the Secretary of the Interior, whose decision shall be conclusive. Any surplus of such accumulated net profits and future profits from such sources shall be applied as provided by Subsection I, section 4, Act of December 5, 1924 (Forty-third Statutes, page 701)."

Idaho Code, Annotated:

"41-101. *Nature of property in water.*—Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the

state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water."

* * * * * * * * *

"41-103. *Right acquired by appropriation.*—The right to the use of the waters of rivers, streams, lakes, springs and of subterranean waters, may be acquired by appropriation."

Idaho Constitution:

"ARTICLE I. Sec. 14. *Right of eminent domain.* The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby de-

clared to be a public use, and subject to the regulation and control of the state.

"Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor."

* * * * * * * * *

"ARTICLE XV. Sec. 1. *Use of waters a public use.*—The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law."

* * * * * * * * *

"ARTICLE XV. Sec. 3. *Water of natural stream —Right to appropriate—State's regulatory power—Priorities.*—The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

VI.

Argument.

A. The United States Court of Appeals Failed to Consider or Decide the Important Federal Questions Presented.

The United States Court of Appeals wholly misconceived the theory upon which the petitioner sought its injunction, and the bases upon which it predicated its petition.

(1) The Court decided that the basic issue "relates to whether the Secretary properly determined that the $50,000 in question was not part of the plant's net profits" (R. p. 333). No such issue was raised by the petitioner. Obviously all of the money was not profit from the plant, because the plant was shut down during a portion of the time. The issue was whether the Secretary could shut off the water judicially decreed for power, and thereafter refuse to credit to the petitioner the money proceeds of that illegal conversion of the petitioner's vested property interest.

(2) The Court held that the allocation of the profits from the plant by the then Secretary of the Interior in 1927, was pursuant to a contract between the United States and the Burley Irrigation District (petitioner), dated March 15, 1926 (R. p. 338). That allocation was not pursuant to that contract. That contract merely related to the transfer of the care, operation and maintenance of certain parts of the Reclamation works, and substituted the Burley Irrigation District, a quasi-municipal corporation, as the party in interest on behalf of all the water users in the Burley District (Pl. Ex. 1, pp. 158-160, 165). The 1927 allocation of profits was premised entirely upon the fact that when the power plant was built, its cost was charged to the water users in the Burley District, and that under their original water right contracts, individually executed, beginning in 1915, these landowners and entrymen agreed to pay amounts thus charged against them. The ruling of the then Secretary of March 14, 1927, and the reaffirmation of

the later Secretary of March 2, 1929, made no reference to any contract of March 15, 1926; the decree of the Supreme Court of the District of Columbia in the first injunction suit (*Burley Irrigation District* v. *Wilbur,* Equity 50636) made no reference to such contract; and it is clear that the Court of Appeals premised its decision in that case upon the allocation of the construction costs by Secretary Lane in 1915, and not upon any contract of 1926. Thus, the basic right of the petitioner was not a contract right, but was a vested property right, arising out of the fact that it had been charged with and required to pay the cost of the construction of the plant.

(3) The Court held that, "The crux of the matter is in the findings that execution of the plan (that is, the shutting off of the water from the plant and its storage for irrigation purposes) was essential for the plaintiff's benefit,* * *" (R. p. 347). The argument of the Court is that since the storage of this water for irrigation purposes, and the contracts which were consequent to that action, resulted in benefit to the petitioner, therefore the Secretary had a right thus to shut off the water. This is equivalent to an argument that because a landowner has a large family of children, and therefore the erection of a public school on his property would be to his benefit, therefore the state may confiscate part of his property for school purposes, without compensation and without recourse to judicial process. This is the precise negative of the whole thesis of due process of law.

(4) The Court, referring to the contract between the Idaho Power Company and the Secretary of the Interior, said, "Plaintiff is not a party to that contract, though it has been benefited greatly by it. It therefore has no right to challenge it * * *" (R. p. 349). We respectfully submit that the law knows no such doctrine. If the contract be an essential part of a plan whereby petitioner is deprived

of its property, it has a right to challenge the contract and a right to challenge the entire plan.

In order to create an estoppel by the acceptance of benefits, it is essential that the party against whom the estoppel is claimed, should have acted with knowledge of his rights; also that the party claiming the estoppel was without knowledge or means of knowledge of the facts on which he bases his claim of estoppel, that he was influenced by and relied on the conduct of the person sought to be estopped, and that he changed his position in reliance thereon to his injury. * * * And it has been said that it is only where a party may accept or reject without serious inconvenience that an estoppel arises from the acceptance of benefits.

International Mtg. Bk. v. *Whitaker,* 44 Ida. 178, 255 Pac. 903.
Moore v. *Meyers,* (Ariz.) 255 Pac. 164.
New York Life Insurance Co. v. *Talley,* 72 Fed. (2d) 715.
Idaho Farms Co. v. *Northside Canal Co.,* 24 Fed. Supp. 189.

(5) The Court of Appeals at no point in its opinion referred to or discussed any case or statute cited as authority by the plaintiff, except *Wilbur* v. *Burley Irrigation District,* 58 Fed. (2d) 871, 61 App. D. C. 145, the first litigation of this controversy.

The principal citations submitted to the Court by petitioner were:

Section 661 of Title 43 of the U. S. Code (Act of July 26, 1866, 14 Stat. 253), providing that rights to the use of water for manufacturing purposes recognized by local laws and decisions of the Court shall be maintained and protected;

Section 41-101 of the Idaho Code Annotated, providing that the right to use public waters in Idaho is an appurtenance to the thing to which the water is beneficially applied;

United States v. *Utah Power and Light Co.*, 208 Fed. 821, *Thompson Co.* v. *Pennebaker*, 173 Fed. 848, and *Speer* v. *Stephenson*, 16 Idaho 707, 102 Pac. 365, holding that the generation of power is a beneficial use;

Ickes v. *Fox*, 300 U. S. 82, holding that although the United States is the diverter, storer and distributor of water, nevertheless, water used for irrigation purposes is an appurtenance to the land to which it is beneficially applied and that therefore the water rights are the property of the land-owner;

Montpelier Milling Co. v. *City of Montpelier*, 19 Idaho 212, 113 Pac. 741, and *Basinger* v. *Taylor*, 30 Idaho 289, 164 Pac. 522, holding that water appropriated for power purposes cannot be taken for a public purposes, even for domestic use, without compensation therefor, such right to use the water for power purposes being a property right protected by the Constitution;

Noble v. *Union River Logging Railroad*, 147 U. S. 165, and other cases, holding that the restraint of the Fifth Amendment applies to the Secretary of the Interior and that it is a protection to corporations, as well as to natural persons;

Pomeroy's Equity Jurisprudence, 4th Ed. sec. 1047, and other authorities, holding that wherever one person has wrongfully taken the property of another and converted it or transferred it, a constructive trust arises and follows the proceeds.

The opinion of the Court of Appeals contains many other statements less vital than the foregoing as enumerated in paragraphs one to five, which in an exhaustive review of the opinion we would challenge.

The sum total of the situation is as follows: The entrymen and landowners in the Burley Irrigation District were charged with the cost of the construction of a power plant, which charges they have been meeting over a period of twenty-five years, all as provided by the Reclamation Law. The Secretary of the Interior, in 1927, determined that

by reason of such undertaking these persons became entitled to ninety-five and six-tenths per cent of the profits from the operation of the plant, and, as recited by a later Secretary, "On the faith of that ruling, the Burley Irrigation District has acted and has undertaken extensive improvements" (R. p. 71). Under a decision of the Court of Appeals for the District of Columbia, which has long since become final, the right to those profits is a vested property right. By judicial decrees of the State and Federal Courts, having jurisdiction of the matter, 2,700 second-feet of water were allocated for power purposes at this plant, which amount of water was sufficient to meet all demands for power on the Project. The Secretary of the Interior shut off the water thus judicially allocated, and thereby became the recipient of a sum of $50,000. The petitioner insists that its vested property rights were protected by the due process of law requirements of the Constitution, and that equity will direct that it be credited with the proceeds derived from an invasion of its property rights, which invasion is illegal because in violation of the due process requirements.

The decision of the United States Court of Appeals in this case raises an important federal question, and the matter involved is of great public interest. The Court's ruling in this case affects the property rights of all settlers or entrymen on reclamation projects throughout the West and involves a judicial determination of the rights which entrymen acquire under the Reclamation Law after they have paid or agreed to pay the construction costs of the various facilities that are included in the Project.

If entrymen on a reclamation project can be deprived of water for power purposes, they can be deprived of water for irrigation purposes, at the will and caprice of any Secretary of the Interior. It is of great interest to all settlers and entrymen on reclamation projects that it be determined by this Court that by the payment of the construction costs, they acquire a property right in the facilities of the Project for which they pay.

B. Petitioner is the Equitable Owner of the Power Plant and the Water Rights Appurtenant Thereto.

In 1915, the landowners and entrymen in the Burley Irrigation District were charged by the Secretary of the Interior with 95.6 per cent of the cost of the construction of the Minidoka Power Plant. Continuously, since that time, the landowners and entrymen and later the petitioner, organized by them, have periodically paid the required installments on those costs.

On two occasions, respective secretaries of the Interior officially determined that petitioner was the owner of 95.6 per cent of the power plant. In 1929, petitioner filed suit in the Supreme Court of the District of Columbia to enjoin Secretary Wilbur from disturbing the determinations of his predecessors as to the ratio of ownership. The Court found for petitioner (*Burley Irrigation District* v. *Wilbur*, Equity No. 50636). The Court of Appeals of the District of Columbia affirmed the judgment of the lower court (*Wilbur* v. *Burley Irrigation District*, 58 Fed. 2nd 871, 61 App. D. C. 145). The appellate Court said that the threatened action "would amount to a readjustment of the ratio of ownership of the two districts in the power plant", and "is an interference with property rights already vested." That Court, therefore, expressly held that petitioner had vested property rights in the power plant.

Petitioner's property rights in the water judicially decreed for the generation of power at the plant are coextensive with its property rights in the plant itself. The law of Idaho provides:

> "And the right to the use of any public waters which have heretofore been or may hereafter be allotted or beneficially applied * * * shall become the complement of or one of the appurtenances of the land or *other thing* to which, through necessity, said water is being applied." (Idaho Code Annotated, sec. 41-101—Italics added.)"

It is settled, beyond dispute, that the use of water for the generation of power is a beneficial use. *United States* v. *Utah Power and Light Company,* 208 Fed. 821; *Thompson Company* v. *Pennebaker,* 173 Fed. 849; *Speer* v. *Stephenson,* 16 Idaho 707, 102 Pac. 365; *Montpelier Milling Company* v. *City of Montpelier,* 19 Idaho 212, 113 Pac. 741.

This Court has set at rest the question as to the ownership of water applied to a beneficial use on a reclamation project. In *Ickes* v. *Fox,* 300 U. S. 82, it was alleged that the Secretary attempted to make an additional charge for water previously allotted, to a corporate predecessor in interest, for irrigation purposes. This Court said (pp. 93, 94):

> "So far as these respondents are concerned, the government did not become the owner of the water-rights, because those rights by Act of Congress were made 'appurtenant to the land irrigated'; and by a Washington statute, in force at least since 1917, were 'to be and remain appurtenant to the land.' * * * Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land-owners; and by the terms of the law and of the contract already referred to, the *water-rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. The government was and remained simply a carrier and distributor of the water* (ibid), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works." (Italics added.)

In the instant case, the Court of Appeals completely ignored that decision, as well as the decisions and statutes of Idaho referred to herein. That Court wholly failed to understand petitioner's position.

Point I of the opinion of the Court of Appeals rests upon the proposition that petitioner claimed "ownership" of the power plant, whereas its only vested right was to receive credit for the net profits of the plant. The Court said, referring to the *Wilbur* case, "Nor did it determine ownership of the plant. At most it determined 'ownership' of the right to receive credit for the plant's net profits in the specified percentages. These are entirely distinct matters, as distinct in fact as the well-established distinction between ownership of a business and a right to share in its profits." Citing partnership cases and the Uniform Partnership Act. (R. p. 344) The Court further said, "Plaintiff, however, rests its contrary argument on the view that the issue decided in the *Wilbur* case was 'the ownership' of the Minidoka Plant." (R. p. 344.) This erroneous view, basic in the Court's determination of the case, represents a total misconception of the petitioner's position and of the issue presented. The petitioner at no time, either in the *Wilbur* case or in the present proceeding, claimed ownership of the plant in the sense that "ownership" denotes the legal title or even the custody of the property. There is no question whatsoever but that the Government is the possessor of the legal title to all this property, including the power plant, and that it has the right to manage, control and operate the property. Petitioner has never at any point, either in this action or in the prior action, contended to the contrary. The petitioner claims that it is the *equitable* owner of 95.6 per cent of the power plant and the water that is appurtenant to the same, and by reason of its ownership in the power plant, it is entitled to receive 95.6 per cent of the profits from the sale of power that could be generated at said power plant; that its right to receive profits is because of its ownership in the plant and this property right is as fully protected against confiscation without due process of law as is a legal ownership.

The Court says that there is a well-established distinction between the ownership of a business and a right to share

in its profits. So there is, just as there is a well-established distinction between the property rights of a trustee-custodian, and the property rights of a beneficiary. The point at issue is whether the property rights of a beneficiary, who is not the holder of the legal title and who does not have the right to manage, control and operate the property, are protected against confiscation without due process of law. The Court said that "For some purposes and in regard to some issues, it is true, as Lord Coke's celebrated inquiry indicates, that land may be identified with its rents; and a business with the right to a share in its profits." (R. p. 345) But the present case does not present a question of such identification. However true that statement is, it in no way conflicts with the proposition, clear beyond question, that the right of equitable owners, the right to rents, or the right to profits, is a property right recognized both at law and in equity, that such property right may be distinct from the ownership of the legal title and of the custody of the property, but that, nevertheless, it is fully protected by all the rules applicable to the protection of vested property interests.

C. The Respondent Could Not Lawfully Deprive Petitioner of Its Vested Property Rights or of any Part of the Value Thereof, Without Due Process of Law and Just Compensation.

The Fifth Amendment prohibits the taking of property without due process and just compensation. It is a restraint on the executive as well as the legislative and judicial powers of the Federal Government. *Murray's Lessee, et al.* v. *Hoboken Land and Improvement Company,* 18 How. (59 U. S.) 272. And its protection extends to corporations as well as to natural persons. *Union Pacific Railroad Company* v. *U. S.,* 99 U. S. 700, 719; *Carter* v. *Carter Coal Company,* 298 U. S. 238, 311. The Amendment applies to a direct taking exactly as has been accomplished and threat-

ened here. This Court has expressly applied the restraint of the Fifth Amendment to the Secretary of the Interior. In *Noble* v. *Union River Logging Railroad,* 147 U. S. 165, this Court affirmed a decree enjoining the Secretary from revoking the action of his predecessor under whose official act vested property rights in land had been acquired. The respondent here attempts to do likewise. This Court said (p. 176) that a revocation of the action of the Secretary "by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void". See also *Ickes* v. *Fox,* 300 U. S. 82, 96.

The record clearly shows that the petitioner's water rights, decreed for power purposes, have been taken by respondent for irrigation use. The water so decreed is withheld and stored in American Falls Reservoir and is not used to operate the power plant. (R. p. 341.) The use of water for irrigation is a public use. *Clark* v. *Nash,* 198 U. S. 361. Thus, respondent has appropriated petitioner's property to a public use, in violation of the due process clause.

Such a taking is likewise in violation of the Constitution and Statutes of the State of Idaho and of an express Congressional mandate that such rights be protected. (Const. of Idaho, Article I, Section 14; Idaho Code Annotated, section 41-101; *Montpelier Milling Company* v. *City of Montpelier, supra; Basinger* v. *Taylor, supra;* Act of July 26, 1866, 14 Stat. 253, Title 43 U. S. C. A. 661) In the *Montpelier* case, the court held that the use of water for the generation of power was a beneficial use, that the use of water for irrigation was a public use and that the constitution of Idaho—

> "* * * clearly recognizes that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of property for public and private use as referred to in * * * the constitution."

The same considerations apply with equal force to the partial destruction of petitioner's property right in the power plant, for the generation of electric energy. Petitioner's property right in the power plant is rendered valueless to the extent that the generating facilities of the plant are curtailed by the withholding of the water. This Court said in *Buchanan* v. *Warley*, 245 U. S. 60:

> "Property is more than the mere thing, which a person owns; it includes the right to acquire, *use*, and dispose of it; and the constitution * * * protects these essential attributes." (Italics added.)

The respondent has confiscated petitioner's property.

D. The money Proceeds, Received by Respondent as a Result of His Unlawful Deprivation of Petitioner's Property Rights, Are Impressed with a Trust in Favor of Petitioner.

The proceeds which came into respondent's possession as the result of his unlawful conversion of petitioner's property belong to petitioner and are impressed with a trust in his favor. This is in accord with long established principle.

In *Pomeroy's Equity Jurisprudence* (4th Ed.) it is said:

> "The specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts." (Sec. 1045)
>
> "By the well-settled doctrines of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it. * * * It is true that the beneficial owner can often recover the money due to him by a legal action upon an implied assumpsit; but in many instances a resort to the equitable jurisdiction is proper and even necessary." (Sec. 1047).
>
> "It is not essential for the application of this doctrine that an actual trust or fiduciary relation should exist between the original wrong-door and the beneficial owner. Wherever one person has wrongfully taken the property of another, and converted it into a

new form, or transferred it, the trust arises and follows the property or its proceeds." (Sec. 1051)

Other authorities have consistently followed and affirmed the principle. *National Bank* v. *Insurance Company,* 104 U. S. 54, 58; *Gwynn* v. *Spurway,* 28 Fed. 2d 37; *Silsbury* v. *McCoon,* 3 N. Y. 379; *Bogert on Trusts and Trustees,* Sec. 471; *Restatement of the Law of Restitution,* Sec. 202.

CONCLUSION.

It is therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and to such an end a writ of certiorari should be granted and this Court should review the decision of the U. S. 54, 58; *Gwynn* v. *Spurway,* 28 Fed. (2d) 37; *Silsbury* v. United States Court of Appeals for the District of Columbia and finally reverse it.

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INDEX

CITATIONS

286402—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 660

BURLEY IRRIGATION DISTRICT, A CORPORATION,
PETITIONER

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (R. 326–328) and of the court of appeals (R. 333–350) are not reported.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered September 30, 1940 (R. 351). The petition for writ of certiorari was filed December 30, 1940. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner is entitled to 95.6 percent of the profits realized upon the commercial sale of electricity generated by the Minidoka power plant. The plant, because irrigation needs came to absorb all of its firm power, also sold electricity furnished it by the Idaho Power Company in exchange for electricity received from the Black Canyon plant. Pursuant to the contract, the respondent credited the Black Canyon plant with $50,000 of the proceeds realized by the Minidoka plant from the sale of this electricity. The question is whether the respondent should instead have given petitioner credit for 95.6 percent of that sum.

STATUTES INVOLVED

The pertinent provisions of the Act of December 5, 1924, c. 4, 43 Stat. 672, 703, and the Act of May 10, 1926, c. 277, 44 Stat. 453, 480, are set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

Petitioner is an Idaho corporation organized by water users on the lands of the Pumping Division of the Minidoka Reclamation Project (R. 173), a project instituted under the Reclamation Act[1] (R. 174).

The Minidoka power plant was constructed (R. 174) to furnish power for pumping water to lands within the project which could not be irrigated by

[1] Act of June 17, 1902, c. 1093, 32 Stat. 388, as amended.

gravity (R. 175). An appropriation of 2,700 second-feet was made for power purposes (R. 196–197). Upon the basis of use of power for pumping, 95.6 percent of the cost of the plant was assessed against the lands of the Pumping Division and 4.4 percent against the lands of the Gravity Division of the project (R. 40).

Construction of the plant was commenced in 1908; the first of six generating units was completed in 1909 and the last was completed in 1926. From an early date, the plant generated more power than was needed for pumping. Such surplus power was sold to residents on the project and in adjacent towns. These sales progressively increased and became correspondingly profitable. (See R. 336.)

By contract of March 15, 1926, the care, operation, and maintenance of certain of the works of the Pumping Division were transferred to the petitioner (R. 178). By a similar contract, the United States transferred certain of the works of the Gravity Division of the project to the Minidoka Irrigation District (R. 178–179), an Idaho corporation organized by water users on lands of that division (R. 174). However, the United States retained control of all the major works, including the power plant (R. 178).

In case of such a transfer, the accumulated net profits derived from the operation of project power plants are to be determined by the Secretary and credited to the obligations of the division involved.

Act of December 5, 1924, sec. 4, subsec. I, c. 4, 43 Stat. 672, 703; 43 U. S. C., sec. 501. The Act of May 10, 1926, directed specifically to the Minidoka project, also provides that the decision of the Secretary apportioning accumulated net profits shall be conclusive, c. 277, 44 Stat. 453, 480. Accordingly, the contract with petitioner provided that the Secretary would determine the total accumulated profits to be credited to the Minidoka project and the percentage of such profits which should equitably be credited to the lands of the Pumping and Gravity Divisions (R. 10–11).

Pursuant to the 1924 and 1926 Acts, Secretary of the Interior Work, on March 14, 1927, determined that the profits from the sale of power generated at the Minidoka plant should be credited to petitioner and the Minidoka district in the proportion that the costs of the plant had been assessed against the lands, i. e. 95.6 percent to the former and 4.4 percent to the latter (R. 68–69). Subsequently, Secretary Wilbur attempted to redetermine the percentage and to direct that petitioner be credited with only 72.7 percent of the profits and that the Minidoka district receive credit for the remaining 27.3 percent. Petitioner thereupon brought suit in the Supreme Court of the District of Columbia and obtained a permanent injunction prohibiting division of profits otherwise than as fixed by Secretary Work (R. 19–21). The court of appeals affirmed the decree. *Wilbur* v. *Burley Irrigation*

District, 58 F. 2d 871 (1932). The court held (pp. 873–874):

> This allocation of the cost of the power plant between the two districts, as found by Secretary Lane, was approved by Secretary Work, and the contracts entered into with the respective district corporations recognized and were based upon this division of costs and profits. The acts of 1924 and 1926, * * * under which Secretary Work proceeded, specifically prescribed that his decision should be conclusive and final. It is clear, therefore, that any attempt on the part of the present Secretary to revise, modify, or change these contracts is an interference with property rights already vested; a matter over which the jurisdiction of the Secretary no longer exists.
>
> * * * * *
>
> Where a final determination has been made and property rights as a result thereof have become vested, it is not within the jurisdiction of the determining Secretary or his successor in office to review or revise it, and any attempt at such action will be enjoined by the courts. * * *

The facts immediately pertinent to the present controversy were found by the trial court. In substance they are as follows:

Effective October 1, 1934 (R. 189) the respondent Secretary entered into a contract with the Idaho Power Company whereby the latter agreed to fur-

nish power to the Minidoka project. In partial consideration, the United States extended the life of an earlier contract under which the Idaho Power Company received power developed at the Government's power plant at Black Canyon, Idaho, on the Boise Reclamation Project. In effect, the transaction constituted an exchange of power (R. 181–182).

The contract was made in order to preserve the Minidoka plant's profitable power business and to save for irrigation water being wasted by the plant in the generation of power (R. 184). By 1935 the increasing demands during the irrigation season for pumping had absorbed the entire output of the plant (R. 183). Enlargement of the plant was not practicable (R. 188–189). Since consumers could not have been supplied during the irrigation period, those needing a constant supply of electricity throughout the year would have had to look elsewhere. The Minidoka district, a large consumer of the power, contemplated securing another source of supply (R. 189–190). Operation of the plant in the nonirrigation season was unprofitable. Sales could be made only to those who needed power for heating. Such power is sold at about one-fifth of the price paid for power for general purposes (R. 183). The receipts at such a price would produce no profit and would scarcely pay operating costs (R. 184).

Moreover, from 1931 to 1935 serious water shortages occurred on the project (R. 180) and severe

crop losses resulted (R. 181). In these years, the largest reservoir failed to fill. The operation during the winter months of the Minidoka plant for the generation of power contributed to this failure. There is no reservoir below the plant and consequently the water used by it in winter is lost for irrigation. The water thus annually wasted amounted to more than 225,000 acre-feet or about enough to irrigate the lands of the petitioner district (R. 181).

By means of the power brought in to the Minidoka project under the contract, the plant's profitable power business was preserved. Also, the United States discontinued winter production of power at the plant (R. 183). Thus, there was saved for irrigation in 1935 about 250,000 acre-feet of water (R. 184). Only by execution of the contract was it possible to accomplish these results (R. 188).

On March 12, 1936, the Secretary found that 1935 net profits from the sale of power amounted to $119,128.78 (R. 190–191). He determined that $66,744.26 thereof was derived from sale of power generated at the Minidoka plant. Accordingly, 95.6 percent of this sum was allocated to the petitioner (R. 191). He further determined that $50,000 of the remainder was attributable to profits from the Idaho Power Company and this sum he credited to the Black Canyon power plant in payment for the power furnished by it to the Idaho Power Company.[2]

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[2] The balance, $2,384.52, was credited to the Minidoka Irrigation District in compensation for a guarantee given by

On March 28, 1936, petitioner brought this suit to enjoin the respondent Secretary from crediting any of the $50,000 to the Black Canyon plant or otherwise than 95.6 percent to petitioner and 4.4 percent to the Minidoka district (R. 1–37). The trial court made findings of fact (R. 172–201) and conclusions of law (R. 201–208) and dismissed the complaint (R. 208–209). The court of appeals affirmed (R. 351), holding that the Secretary was authorized to shut down the power plant when it was not needed for irrigation purposes (R. 347–348) and that he rightly credited the Black Canyon plant with the $50,000 in payment for the power furnished by it to the Idaho Power Company (R. 348–349).

ARGUMENT

Petitioner contends (pp. 23–26) that, despite the legal title of the United States, it is the equitable owner of 95.6 percent of the power plant and of the appropriation of water made for power purposes. The contention is without substance. The claim in respect of the power plant is based (pp. 18–19, 23) upon *Wilbur* v. *Burley Irrigation District,* 58 F. 2d 871 (App. D. C., 1932). However, as the court below held in the instant case (R. 343–346), its earlier holding merely was that the Secre-

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that district to the United States that annual net revenues from sales in the district would amount to $50,000 (R. 189). Since petitioner did not make that district a party to this action, the validity of that credit is not here involved (See R. 342).

tary of the Interior was without jurisdiction to reconsider a determination which by the Acts of December 5, 1924, and May 10, 1926 (Appendix p. 11), was made conclusive and final.

Petitioner claims (pp. 6, 23–24) that the appropriation of water for power purposes is appurtenant to the power plant. But petitioner, since it has no equity in the plant, has no rights in the appropriation.

However, even if well-founded, petitioner's assertion of ownership would not tend to show that the courts below erred. Thus petitioner argues (pp. 18, 19, 25, 26) that, as equitable owner, it is entitled to the profits that would have been made if respondent had not shut down the plant. But it is plain that, if the plant had been operated, there would have been no profits. The trial court found (R. 183, 184–185, 193) that the production of power by the plant for commercial sale was unprofitable (see p. 6, *supra*). The court of appeals held (R. 339–340, 343, 347–348) that this finding was sustained by the evidence.

It is unnecessary, therefore, to consider petitioner's further contentions that in crediting the $50,000 to the Black Canyon power plant the respondent confiscated petitioner's property (pp. 26–28) and that it is entitled to that sum in compensation (pp. 28–29).

CONCLUSION

The decision of the court of appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

JANUARY 1941.

APPENDIX

Section 4, subsection I of the Act of December 5, 1924, c. 4, 43 Stat. 672, 703, provides:

> That whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid. [43 U. S. C., sec. 501.]

The Act of May 10, 1926, c. 277, 44 Stat. 453, 480–481, provides in part:

> Minidoka project, Idaho: * * * *Provided,* That the accumulated net profits as determined by the Secretary of the Interior, arising under the project, derived from the operation of the project power plants, leasing of Government grazing and farm lands, the sale and use of town sites, and from all other sources, shall be applied by the Secretary of the Interior, so far as may be necessary, in

payment of any water-right charges due the United States by any individual water user or irrigation district to whose benefit personally or in the aggregate such accumulated profits should equitably accrue in the judgment of the Secretary of the Interior, whose decision shall be conclusive. Any surplus of such accumulated net profits and future profits from such sources shall be applied as provided by Subsection I, section 4, Act of December 5, 1924 * * *;

* * * * *

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